

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

77-1215

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

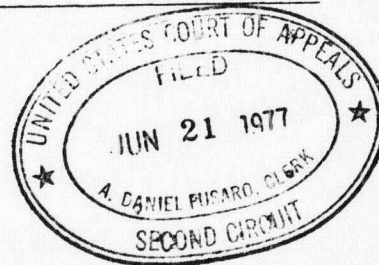
VICTOR ABRAHAM HOLMES,

Appellant

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX FOR APPELLANT



JOSEPH T. KLEMPNER
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PAGINATION AS IN ORIGINAL COPY

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FILE SECTION	OFFENSES CHARGED	ORIGINAL COUNTS
18:2113 (a)	Bank robbery	1
18:2113 (d)	Armed bank robbery	2

ARREST	DETENTION	ADJUDICATION	TRIAL
2-17-76	5-19-76	5-19-76	3-1-77
5-4-76			3-3-77

U.S. MAG. CASE NO. **76 0454 02**
 RELEASE
☐ AMI ☐ Fugitive
☐ Set ☐ Pers. Recog
☐ PSA
 Conditions
☐ 10% Deposit
☐ Surety Bond
☐ Collateral
☐ 3rd Party Cust
☐ Other
 SENTENCE
☒ On All Charges
☒ On Lesser Offense(s)
☐ WOP ☐ WOP

DATE	INITIAL NO.	MAGISTRATE	INITIAL NO.	OUTCOME
				DISMISSED
				HELD FOR CLERK OF DISTRICT
				HELD FOR CLERK OF DISTRICT

Ira H. Block
 791-1916

ATTORNEYS
 Joseph Klempner
 401 Broadway
 N.Y. N.Y. 10013
 212-311-77

Santos-Figueroa, et al.

DATE	PROCEEDINGS	EXPLANATION
5-4-76	Filed indictment, Case assigned to Judge Werker superseding 76 Cr 203.	Wyatt, J.
5-19-76	Hearing on bail application--bail reduced to \$5,000 secured by \$400.00 cash. Werker, J. Deft. remanded in lieu of bail--reamand issued.	
5-19-76	Deft. and atty. Joseph Klempner present. Deft. waives formal reading of indictment and pleads not guilty. Deft. waives speedy trial right until June 1, 1976. Bail fixed at \$5,000 secured by \$400.00 cash and signature of deft., wife and father in law, Leon Barnes who must acknowledge in writing to AUSA Block that deft. will be held in his custody. Deft. must report every Monday to Pre Trial Service office. Deft. must not contact other defts. or their families. Werker, J.	
5-28-76	Filed govts. notice of readiness for trial.	

Cont'd on page 2

DATE	IN PROCEEDINGS (continued)	PAGE TWO	V EXCLUDABLE DELAY	FD
	(DEPT. OF JUSTICE)	Inmate	Total	Days
		(a)	(b)	(c)
5-21-76	Filed appearance bond in the amt. of \$5,000 secured by cash. (receipt # 70776)		\$8400.00	A
11-18-76	Deft. Victor A. Holmes, AUSA Block & Joseph Klempner, Esq, present BAIL IS REVOKED & deft. placed in custody of NYPD. BENCH WARRANT lodged as RETAINER. Trial date set for Feb. 28, 1976 at 10A.M.....WERKER, J.			
11-18-76	Bench Warrant Issued.			
1-11-77	Deft, Atty present B/W & detainer satisfied Bail set at \$5,000 PRB & \$500.00 Cash DEft released in custody of atty Joseph Klempner till 5 P.M. 1-12-77 to produce bail. DEft to report in prison to pre-trial agency every Monday.. Worker, J.			
1-13-77	Fid warrant for arrest of deft on 11-18-77 Executed same			
1-21-77	Filed appearance bond in the amount of \$5,000. RECEIPT# 81734			
1-23-77	Filed B and DEft released from custody of U.S. Marshal Bond posted as Directed by the Court			
2-7-77	Fid affid for W/H/C Ad Testificadum ret 2-14-77			
2-18-77	Fid order that the Army military records furnished to the Clerk of the Court in response to the subpoena duces tecum shall be released to the custody of the U.S. Marshall for this district			
2-24-77	Filed Writ of H/C Ad Test. of deft. RET 2-28-77. so ordered BRIEANT, J.			
2-24-77	Filed Govt's Affidavit for Writ of Habeas Corpus Ad Test.			
2-25-77	Filed ORDER that VINCENT HICKS be admitted into the custody of the FBI. for a period of this order to the end of the trial in order in testify. So ordered BRIEANT, J.			
3-7-77	Filed GOVT's request to charge.			
3-1-77	Deft (Atty Joseph Klempner Pres) Jury trial begun.			
3-2-77 T	Trial Cont'd			
3-3-77	Trial Cont'd			
3-3-77	Trial Cont'd and concluded. Jury verdict deft. guilty on cts. 1 & 2 as charged. P.S.I. ordered sentence adj'd 4-1-77. DEft. remanded. So orderedBRIEANT, J.			
4-11-77	Filed JUDGMENT AND PROBATION/COMMITMENT ORDER - The deft. is hereby committed to the custody of the Atty Gen for impr for a period of SEVENTEEN (17) YEARS on count 2. Count 1 is merged with count 2 for purpose of sentence as a necessarily included offense. SO ORDERED BRIEANT, J. REMANDED, All copies issued.			
4-11-77	Filed NOTICE APPEAL by the deft to the USCA from the Judgment filed 4-11-77. Leave to appeal in forma pauperis -granted, Briant, J. US Atty And Counsel for deft Mailed notices.			
5-11-77	Filed transcript of record of proceedings, dated 5-19-76. Filed in 70-200			
4-13-77	Filed commitment & entered return, DEft. delivered to - 4-11-77			

Cont'd on page 3

DATE	PROCEEDINGS
1-14-77	Filed MEMORANDUM - After outcome of State and County charges the Court should be entitled, on application, to a Pro tanto reduction of the sentence imposed in this case. So ordered Brigant, J. m/n
2-2-77	Filed transcript record of proceedings dtd: 2/1/77
5-2-77	" " " " " " 3/5/77
5-2-77	" " " " " " 3/3/77
5-2-77	" " " " " " 2/1/77
5-3-77	Filed Notice to docket clerk of the 1st Supplemental record being certified and transmitted to the Clerk.
5-5-77	Filed Court's Proposed examination of prospective jurors.

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

**HARRY SANTOS-FIGUEROA,
VICTOR ABRAHAM HOLMES and
VINCENT HICKS,
a/k/a "Gregory Johnson,"
a/k/a "Slick,"**

Defendants.

INDICTMENT

3 76 Cr.

COUNT ONE

The Grand Jury charges:

On or about the 17th day of February, 1976, in the Southern District of New York, HARRY SANTOS-FIGUEROA, VICTOR ABRAHAM HOLMES and VINCENT HICKS, a/k/a "Gregory Johnson," a/k/a "Slick," the defendants, unlawfully, wilfully and knowingly, by force, violence and intimidation, did take and attempt to take, from the person and presence of employees of Bankers Trust Company, 1770 Madison Avenue, New York, New York, property, to wit, two Smith & Wesson .38 caliber revolvers, and money, which belonged to, and were in the care, custody, control, management and possession of said Bankers Trust Company, the deposits of which were then insured by the Federal Deposit Insurance Corporation.

(Title 18, United States Code, Sections 2113(c) and 2.)

COUNT TWO

The Grand Jury further charges:

On or about the 17th day of February, 1976, in the Southern District of New York, HARRY SANTOS-FIGUEROA, VICTOR ABRAHAM HOLMES and VINCENT HICKS, a/k/a "Gregory

INB:fk
76-0623

Johnson," a/k/a "Slick," the defendants, unlawfully, wilfully and knowingly, did assault and put in jeopardy the lives of numerous persons by use of dangerous weapons, to wit, firearms, while committing the offense described in Count One of this Indictment.

(Title 18, United States Code, Sections 2113(3) and 2.)

FOREMAN

ROBERT M. FISH, JR.
United States Attorney

CHARGE OF THE COURT

Judge Brieant

(In open court - jury present)

THE CLERK: The Court is about to charge the jury. Any spectator wishing to leave will do so now or remain in their place until the completion of the Court's charge.

THE COURT: Mrs. Boyd and members of the jury:

We are now at that stage in the trial where you will soon undertake your final function as jurors, and here you perform one of the most sacred obligations of citizenship, that is, acting as ministers of justice.

You are to discharge this final duty in an attitude of complete fairness and impartiality, as I emphasized when you were first selected, without bias or prejudice for or against the government or the defendant as parties to this controversy.

Let me state the fact that the government is a party here entitles it to no greater consideration than that accorded to any other party to a litigation.

By the same token, it is entitled to no less consideration. All parties, individuals and government

1 alike, stand as equals before the Bar of justice in this
2 court.
3

4 Now, your final role here is to decide and
5 pa-s upon the fact issues in the case. You are the sole
6 and exclusive judges of the fact. That is the function
7 of the jury.

8 You determine the weight of the evidence.
9 You appraise and decide the credibility or truthfulness
10 of the witnesses, and you draw the reasonable inferences
11 or conclusions from the evidence and you resolve such
12 conflicts as there may be in evidence.

13 My final function here in this trial is
14 to instruct you as to the law. It is your duty to accept
15 these instructions as to the law and to apply them to the
16 facts, as you find them to be.

17 You are not to take any single instruction
18 alone, which I give you, as stating the law, but you
19 consider all of my instructions taken together as a whole.

20 With respect to any fact matter, it is your
21 recollection, and yours alone, that governs. Anything
22 that the lawyers, either for the government or the
23 defendant, may have said with respect to matters in
24 evidence, whether during the opening statements or
25 during the trial or in a question or in argument or in

2 summations, is not to be substituted for your own
3 recollection of the evidence.

4 So, too, anything that I might have said
5 during the trial or anything that I might refer to during
6 the course of these instructions as to any matter in
7 evidence is not to be taken in place of your own recollect-
8 ion.

9 Now, the attorneys in the case not only
10 have their right, but it is their duty to make objections
11 and to press whatever legal theories or factual arguments
12 they may have. They are simply performing their duty
13 in the trial.

14 Any evidence as to which an objection was
15 sustained by the Court and any evidence ordered stricken
16 out by the Court must be disregarded in its entirety.

17 The case is not a contest between lawyers.
18 It is a search for truth and justice. It is a fact-finding
19 mission.

20 Please don't assume that I have any opinion
21 as to any fact matter in the case. I do not. The decision
22 of fact matters is solely for you.

23 Similarly, during the summations, one or
24 perhaps both of the attorneys may have used the expression
25 "I think the evidence shows this or I think the evidence

shows that", and if anybody told you what he thinks, that is only making an argument to you. It is what you think. It is what you find the evidence to be that is controlling in this case. You are to make your own decisions on all factual matters after talking them over with each other in the jury room.

You are not to be affected or precluded by what anyone else thinks of the facts.

Now, as I told you at the outset, the fact that the grand jury voted an indictment here is itself no evidence of the crimes charged. Instead, an indictment is merely the method or the procedure under our law whereby persons accused of crimes by a grand jury are brought in to court to have their case determined by a trial jury, such as yourselves. Therefore, the indictment must be given no evidentiary value but shall be treated by you only as an accusation. It is not evidence or proof of a defendant's guilt and no weight or significance whatsoever is to be given to the fact that an indictment has been returned against a defendant. He has pleaded not guilty and, thus, the government has the burden of proving the charges beyond a reasonable doubt.

A defendant does not have to prove his innocence. On the contrary, a defendant is presumed

2 to be innocent of the accusations contained in the
3 indictment. This presumption of innocence was in his
4 favor at the start of the trial, as I believe I told you
5 before. It continued in his favor throughout the entire
6 trial and it is in his favor now. The presumption of
7 innocence remains in his favor during the course of your
8 deliberations in the jury room and the presumption of
9 innocence is removed only if and when you, the jury,
10 are satisfied unanimously that the government has sustained
11 its burden of proving the guilt of the defendant beyond
12 a reasonable doubt as to the particular count of the
13 indictment that you are then considering. Of course,
14 unless you are so convinced, you must find him not guilty
15 on that count.

16 The question naturally comes up, what is
17 a reasonable doubt? Well, members of the jury, those
18 words almost define and explain themselves.

19 It is a doubt founded on reason arising
20 out of the evidence in the case or the lack of evidence.
21 It's a doubt which a reasonable person has after carefully
22 weighing all the evidence. Reasonable doubt is a doubt
23 that appeals to your reason, your judgment, to your
24 common sense and your experience.

25 It's not caprice or whim or speculation or

conjecture or suspicion and it is not an excuse to avoid the performance of an unpleasant duty and it is not sympathy for a defendant.

If, after a fair and impartial consideration of all the evidence, you can candidly and honestly say that you are not satisfied of the guilt of a defendant, that you do not have an abiding conviction of the defendant's guilt of the particular charge, in sum, if you have such a doubt which would cause you, as prudent persons, to hesitate before acting in matters important to yourselves, then you have a reasonable doubt, and in that circumstance it is your duty to find a verdict of not guilty.

On the other hand, if, after such a fair and impartial consideration of all the evidence, you can candidly and honestly say you do have an abiding conviction of a defendant's guilt on the count of the indictment which you are then considering, such a conviction as you would be willing to act upon in important and weighty matters in your own life, then you have a reasonable doubt and under those circumstances it is your duty to convict as to that particular count that you are then considering.

Reasonable doubt does not mean a positive certainty or beyond all possible doubt. The law in a criminal case is that it is sufficient if the guilt of

the defendant is established beyond a reasonable doubt,
not beyond all possible doubt.

Now, the indictment in this case, members
of the jury contains two counts, and each count charges
a separate crime and each must be considered separately.
You will be asked to state a verdict first as to Count 1
and then you will be asked to state a verdict as to Count 2.

Now, the indictment names three defendants
in all. Mr. Holmes however, is the only defendant on
trial before you and he is the only person for whom you
are required to announce a verdict.

You are not trying the case of Mr. Vincent
Hicks or Mr. Santos-Figueroa. You must bear in mind that
in the determination of such a case, guilt is personal.
The case of the defendant on trial before you must be
determined separately with respect to him solely on the
evidence presented against him or the lack of evidence.
The case of a defendant stands or falls on the proof or
the lack of proof of the charge against him and not against
somebody else.

It happens in this case you will be required
to consider and determine what, if anything, Hicks and
Santos-Figueroa did. I will explain that to you later,
but, basically, the only person on trial is Mr. Holmes and

it is his case that is before you for decision.

Now, for your guidance in considering the evidence you have heard, I must tell you there are two classes of evidence recognized and admitted in courts of justice upon either or both of which you may find an accused person guilty of a crime. One is called direct evidence and the other is called circumstantial evidence.

Direct evidence tends to show the fact in issue without the need for any further amplification. Of course, there is always the question of whether it is to be believed.

Circumstantial evidence is evidence that tends to show facts from which the fact in issue may reasonably be inferred. It is evidence which tends to prove the fact in issue by proof of other facts which have a legitimate tendency to lead the mind of the jurors to infer that the facts sought to be established must be true.

Now, there is a traditional example. Sometimes, if you are in a courtroom and on one of the higher floors in this building on a day like today, it is difficult some times to tell, merely by looking out the window, whether it is raining outside. However, if you look o the window and you see that the people passing

2 by in the street below, assuming it is a cloudy day,
 3 have their umbrellas up, well, you usually come to the
 4 conclusion it must be raining outside. You have direct
 5 evidence. The evidence of your own senses, that is,
 6 that the umbrellas are up. That evidence constitutes
 7 circumstantial evidence from which you are entitled to
 8 conclude by a process of reasoning that it must be
 9 raining.

10 In other words, circumstantial evidence
 11 consists of facts proved from which the jury may infer
 12 by a process of reasoning other facts which are in issue.

13 Circumstantial evidence, if believed, is
 14 of no less value than direct evidence for in either case
 15 you must be convinced beyond a reasonable doubt of the
 16 guilt of a defendant before he may be convicted on any
 17 count.

18 Now, statements and arguments of counsel
 19 are not evidence in the case.

20 Questions are not evidence. It is the answers
 21 that are evidence and exhibits, documents, photographs
 22 or articles which have been received in evidence are
 23 evidence in the case.

24 Now, an answer to a question is evidence
 25 in the case no matter who asked the question. It doesn't

1 matter whether the question was asked by the Court, which
2 I have a right to do, or if it was asked by either lawyer
3 or both lawyers. It doesn't matter who asked the
4 question, it's the answer which is of significance to
5 you in your considerations.
6

7 Now, when the attorneys for both sides
8 stipulate or concede or agree about the existence of a
9 fact, as I explained to you earlier, you may accept such
10 a stipulation, whether it is made orally during the trial
11 or whether it is made in writing and marked as an exhibit,
12 as evidence and you may regard that fact proved. For
13 example, the attorneys here have stipulated to the fact
14 that the Bankers Trust Company is a bank which is insured
15 by the Federal Deposit Insurance Corporation, and I instruct
16 you that as to that particular matter, which is an essential
17 element of this case, and as to all of the other various
18 stipulated matters of a factual nature, you can consider
19 the stipulation with the same force and effect as if the
20 fact, which is being stipulated, were testified to under
21 oath by a witness in these proceedings.

22 In determining what evidence you will
23 accept as true, you must make your own evaluation of the
24 testimony given by each of the witnesses and you determine
25 for yourselves what you believe to be the truth and the

degree of weight you choose to give to that testimony. The testimony of a witness may fail to conform to the facts as they occurred because the witness is intentionally telling a falsehood, or because a witness didn't accurately see or hear what he or she testified about, because the witness' recollection is faulty or because the witness hasn't expressed himself clearly in giving testimony.

There is no magic formula by which jurors can evaluate testimony. You bring to this courtroom all the experience and background of your everyday lives. In your everyday affairs you each determine for yourselves the reliability of statements of fact made to you by other people.

The same tests, the same common sense you use in your everyday dealings are the tests that you apply in your deliberations.

You may, of course, consider the interest or lack of interest of any witness in the outcome of this case. A witness who is interested in the outcome of a case is not necessarily unworthy of belief. The interest of a witness, however, is a factor or a possible motive which you may consider in determining the weight and credibility to be given to the testimony of that witness.

In doing this you may also consider whether

1 the testimony of a witness is corroborated or borne out
2 by the testimony of others or by documentary evidence or
3 exhibits. You may also consider the manner in which the
4 witness gives testimony on the stand, the appearance and
5 conduct of a witness in giving testimony, the opportunity
6 the witness had to observe and remember the facts concern-
7 ing which he testifies, and the probability or improbability
8 of the testimony in the light of all the other events
9 in the case.
10

11 You may also consider whether any witness
12 had a motive to lie. These are all items which can be
13 taken into your consideration in determining the credibility,
14 the truthfulness and weight, if any, which you assign to
15 that witness' testimony.

16 If these considerations make it appear
17 there is a discrepancy in the evidence, you have to
18 consider whether this can be reconciled by fitting the
19 conflicting testimony together, and if that is not possible,
20 you will then determine what evidence you will accept as
21 true and what evidence you will reject.

22 Now, if any witness is shown to have
23 knowingly testified falsely concerning any material matter
24 in the trial, you have a right to distrust that witness
25 testimony in other things, and you may reject all of the

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testimony of that witness or you may give it or such parts of it such credence as you think it deserves.

Now, in every criminal case there is a rule which every defendant has the right and privilege to rely on and that is the rule that no defendant is compelled to take the witness stand or offer any testimony.

By pleading not guilty a defendant has, in effect, denied the charges on which he is being tried and puts into issue and requires the government to prove every material fact of the accusations against him as they are stated in the indictment.

endt

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2 It's the government which must prove guilt beyond
3 a reasonable doubt and the defendant cannot be required
4 to testify or disprove anything or bring any evidence.
5 An accused person has the right to stand mute and the fact
6 that he does not take the stand in his own defense may
7 not be considered by you as any indication of guilt or
8 as the basis for any inference whatsoever adverse to the
9 defendant. The presumption of innocence and the government's
10 burden of proving guilt beyond a reasonable doubt have
11 already been explained to you by me.

12 Here the defendant did not take the witness stand
13 and that was his absolute right and I charge you and
14 instruct you that you must not allow this fact in any way
15 to prejudice him or to consider it as any indication of
16 any admission or the basis of any adverse inference as
17 to him of any kind whatsoever. In fact, you are not even
18 to discuss it in the jury room.

19 Now, the evidence in this case includes statements
20 said to have been made by this defendant, Mr. Victor
21 Abraham Holmes, to Detective Hallinan of the New York City
22 Police Department at the 69th Street office of the FBI in
23 which Mr. Holmes is said to have admitted that he was at the
24 scene of the robbery, that he drove the getaway car, and
25 that he planned the bank robbery. He is also said to have

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1 jhh 2

2 provided the names of the other two men who participated
3 with him in the robbery, as well as having identified Harry's
4 gun.

5 Now, if any of these statements were made and
6 if they were voluntary and made after Mr. Holmes had
7 been informed of his rights by being given a rights form
8 by an FBI agent to read and sign and then being orally
9 advised of his rights by Detective Hallinan and if he said
10 he understood his rights and he intentionally waived his
11 rights to be silent or have an attorney present after
12 having been informed of his rights and understanding them,
13 then the jury may regard any statements made by Mr. Holmes
14 at that time as voluntary.

15 If you find a statement was voluntary and in-
16 tentionally made, then an admission by a person of a fact
17 is one of the strongest proofs of that fact known to the
18 law.

19 However, if the statement was not voluntarily made
20 after being fully informed first of his constitutional
21 rights and after having waived his right to remain silent,
22 his right to have an attorney present, then it's entitled
23 to no weight or consideration whatsoever.

24 This is entirely a question for you the jury
25 to determine, that is to say, you are to determine the

A-20

1 jhh 3

2 weight and credibility to be attributed to any such
3 statement which Mr. Holmes may have made in reaching your
4 verdict in this case, and I caution you that it's a matter
5 of dispute as to whether or not such statements were made,
6 and if made, whether or not they were voluntarily, and
7 if they were not voluntary they are entitled to no considera-
8 tion at all.

9 Now, these are factual questions and like all
10 factual questions, they are for you the jury to decide,
11 because you decide all factual questions in the case, and
12 I express no opinion whatsoever as to them.

13 Now, the law permits you in determining whether
14 guilt has been proved beyond a reasonable doubt to
15 consider along with the other evidence in the case the
16 conduct of the defendant, including any statements knowingly
17 made and acts knowingly done, after having been informed
18 that a crime has been committed. When a defendant voluntarily
19 and intentionally offers an explanation or makes some
20 statement tending to show his innocence and this explanation
21 or statement is later shown to be false the jury may con-
22 sider whether this action by a defendant points to a con-
23 sciousness of guilt.

24 Ordinarily it's reasonable to infer that an
25 innocent person doesn't usually find it necessary to invent

1 jhh 4

2 or fabricate an explanation or a statement tending to
3 establish his innocence or to lie to the authorities about
4 innocent conduct, and if such a statement is made it's
5 generally referred to as a so-called false exculpatory
6 statement.

7 Now, the government contends in this case and
8 the defendant denies that the defendant made a false ex-
9 culpatory statement to Detective Hallinan at the office
10 of the FBI when he stated that his rented car had been
11 stolen on the morning of February 17, 1976, the morning
12 of the alleged robbery, while he was at a medical clinic.

13 The government also contends that the defendant
14 made a false exculpatory statement to Miss Bazzi at the
15 Mora Medical Clinic on 96th Street and Park Avenue on the
16 afternoon of the 17th of February, 1976, at which time
17 he told Miss Bazzi that his car had been stolen on the
18 previous day, that is, Monday, the 16th of February, and
19 also allegedly stated that the police had found the stolen
20 car, and that the Medicaid card had been left in the car.

21 Now, whether all of these things are so and the
22 significance, if any, of any false exculpatory statement
23 which may have been made are all issues of fact for you
24 to decide. A false statement is knowingly made if it's
25 made voluntarily and intentionally and not because of mistake.

1 jhh 5

2 or accident or some other innocent reason. The jury will
3 bear in mind that the law never imposes upon a defendant
4 in a criminal case the burden or duty of calling any
5 witnesses or producing any testimony or coming forward
6 to show that it was not false or anything of that nature
7 at all. The burden of proof of guilt beyond a reasonable
8 doubt remains with the government at all times.

9 Now, the government called Vincent Hicks as
10 a witness at this trial and I instruct you that in the
11 prosecution of crime the government is frequently called
12 upon to use witnesses who are accomplices and persons
13 with prior criminal records or both and often it has no
14 choice. The government must rely upon witnesses to transactions
15 such as there may be and it isn't frequent that people
16 of impeccable reputation are witnesses to or participants
17 in alleged criminal endeavors. The government must
18 frequently use such testimony because otherwise it would
19 be difficult or impossible to detect or prosecute wrongdoers.

20 However, experience has shown that accomplices
21 may be motivated to place the responsibility on others
22 than themselves, and accordingly, an accomplice's testimony
23 should be closely examined by the jury, weighed with care,
24 checked with the facts that you find to exist in this
25 case and against other evidence which may assist you in

1 jhh 6

2 determining the weight to be given to his testimony,
3 and then you should give the testimony of an accomplice
4 such value or weight as you deem proper under the circum-
5 stances.

6 On this issue of weighing the credibility of
7 an accomplice you may want to take into account what
8 interest of the accomplice witness will be served, if any,
9 by his telling the truth about the criminal things that
10 he says he is acquainted with, and also what interests,
11 if any, would be served by his coming in and testifying
12 falsely.

13 You should also consider whether the testimony
14 of this accomplice was induced by a belief or a hope that
15 he would somehow receive favorable consideration concerning
16 his efforts to get Judge Werker of this court to reduce
17 his present sentence because he has cooperated by testifying.

18 Now, there is no requirement in the federal court
19 that the testimony of an accomplice be corroborated. A
20 conviction may therefore rest on the uncorroborated testimony
21 of an accomplice, if, but only if, it convinces you of
22 guilt beyond a reasonable doubt. Here the government
23 contends and the defendant disputes that the testimony
24 of Hicks, the accomplice, is corroborated by the testimony
25 of Detective Hallinan, the Johnsons, Mr. Ross and the exhibits

1 jhh 7

2 As I have just stated to you, the fact that
3 a witness may be an accomplice and a felon should be
4 considered by you as bearing adversely on his credibility.
5 However, it doesn't follow that just because a person
6 has knowledge of and has been proved to be a participant
7 in the same crime that he is not capable of giving a
8 truthful version of what he testified to.

9 In the end you must view his testimony with
10 great caution, scrutinize it carefully. Whether he did
11 testify truthfully or not is a fact question for you the
12 jury to decide, like all the fact questions in the case.

13 Now, leaving these general matters which I
14 have just stated to you, I shall now proceed with the
15 indictment in this case. The indictment charges the
16 defendant in count 1 with what is loosely called bank
17 robbery, that is, the use of force, violence or intimidation
18 to take property belonging to a bank and attempting
19 to take money from the bank.

20 The indictment further charges the defendant
21 in count 2 with assault or putting in jeopardy the life
22 of a person by use of a gun during the commission of the
23 alleged robbery and robbery attempt mentioned in count 1.

24 Although one bank robbery is alleged, it's
25 permissible for the defendant to be charged with two crimes

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2 arising out a single robbery. Of course, you must consider
3 each count separately and render a separate verdict
4 on that count. I will explain to you in more detail
5 in a moment.

6 At this time, members of the jury, I will read
7 the indictment to you:

8 "Count 1. The Grand Jury charges on or about
9 the 17th day of February, 1976, in the Southern District
10 of New York, Harry Santos-Figueroa, Victor Abraham Holmes
11 and Vincent Hicks, also known as Gregory Johnson, also
12 known as Slick, the defendants, unlawfully, wilfully
13 and knowingly, by force, violence and intimidation, did
14 take and attempt to take from the person and presence
15 of employees of Bankers Trust Company, 1770 Madison Avenue,
16 New York, New York, property, to wit, two Smith & Wesson
17 .38 calibre revolvers, and money, which belonged to and
18 were in the care, custody, control, management and possession
19 of said Bankers trust Company, the deposite of which were
20 then insured by the Federal Deposit Insurance Corporation.

21 Count 2. The Grand Jury further charges on or
22 about the 17th day of February, 1976, in the Southern
23 District of New York, Harry Santos-Figueroa, Victor Abraham
24 Holmes and Vincent Hicks, also known as Gregory Johnson,
25 also known as Slick, the defendants, unlawfully, wilfully

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2 and knowingly did assault and put in jeopardy the lives
3 of numerous persons by use of dangerous weapons, to wit,
4 firearms, while committing the offense described in Count 1
5 of this indictment."

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6 That is a reading of the indictment. Now, the
7 defendant is charged in Count 1 with having violated Title 18
8 of the United States Code, Section 2113(a).

9 Now, you don't have to know the section numbers
10 of that section of the Code and some other sections which
11 I am about to read to you, but it is essential that you
12 understand what conduct the law forbids with respect to
13 each separate law which I am about to read.

14 Now, Section 2113(a) provides in pertinent part
15 "Whoever by force and violence or by intimidation takes
16 or attempts to take from the person or presence of another
17 any property or money or any other thing of value belonging
18 to or in the care, custody, control, management or possession
19 of any bank" is guilty of a crime.

20 Section 2113(f) of Title 18, United States Code,
21 defines the term "bank" as follows: "Any bank the deposits
22 of which are insured by the Federal Deposit Insurance
23 Corporation."

24 There is another statute under which the defendant
25 is charged which I must discuss with you at this time. The

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2 defendant is charged in this indictment with violating
3 the aiding and abetting statute. This is particularly
4 important for your consideration here, since the defendant,
5 Mr. Holmes, did not himself enter the bank or carry any
6 weapon.

7 The aiding and abetting statute, Title 18,
8 United States Code, Section 2, provides that whoever
9 commits an offense against the United States or aids,
10 abets, counsels, commands, induces or procures its commission
11 by another is punishable as a principal. That is called
12 aiding and abetting, if somebody aids, abets, counsels,
13 commands, induces or procures the commission of a crime
14 by another person.

15 It is not contended by the government in this
16 case that Mr. Holmes actually entered the bank or used
17 a weapon. It is, however, charged and contended here
18 that Mr. Holmes aided or abetted or procured or induced
19 or counseled other persons, that is, Vincent Hicks and Harry
20 Santos-Figueroa, or either of them, to commit that illegal
21 act.

22 Now, what does it mean to aid and abet the
23 commission of a crime? A person who shares in another
24 person's criminal purposes and encourages and assists
25 the other to carry out that criminal purpose makes himself

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2 an aider and abettor and is punishable under the law as
3 a principal, that is to say, just as if he had done it
4 himself.

5 There is no precise rule as to what acts
6 a defendant must perform in order to constitute himself
7 an aider and abettor in the crime of another person or
8 persons. It is enough if the defendant whose case you are
9 considering as an aider and abettor in some manner associated
10 himself with the illegal venture, participated in it as
11 something that he wished to bring about, or that he sought
12 by his actions to make it succeed and had a stake in the
13 outcome.

14 Now, every crime is made up of certain elements.
15 In order to find the defendant guilty on Count 1 of this
16 indictment you must find that each of the following
17 elements have been proven beyond a reasonable doubt:

18 The first element, that on or about February 17,
19 1976, Bankers Trust Company, 1770 Madison Avenue, New
20 York, New York, was a bank the deposits of which were
21 insured by the Federal Deposit Insurance Corporation.

22 The second element which must be proved beyond
23 a reasonable doubt before this defendant can be convicted
24 on Count 1 is that this defendant aided and abetted Santos-
25 Figueroa and Hicks, or one of them, either one, as I have

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2 defined the aiding and abetting to you, to take or attempt
3 to take money or property which was in the care, custody,
4 control, management or possession of the federally insured
5 bank within the Southern District of New York.

6 You will all understand that Madison Avenue
7 and all of Manhattan are located within the Southern
8 District of New York.

9 The third element, that the taking or attempted
10 taking was from a person or in the presence of a person
11 and was accomplished through the use of intimidation,
12 force or violence.

13 The fourth element, that the defendant whose
14 case you are considering here, Mr. Holmes, acted knowingly
15 and wilfully and with specific criminal intent, and also
16 that the person whom he aided and abetted, Santos-Figueroa
17 or Hicks, or either one of them, also acted wilfully
18 and knowingly, with specific criminal intent.

19 Now, I remind you here that you may not find
20 Mr. Holmes guilty as an aider and abettor unless you are
21 satisfied beyond a reasonable doubt that all of the elements
22 of the crime of bank robbery which I just mentioned to you
23 in Count 1 or of assault in Count 2, which I will come to
24 in a moment, were committed by other persons, namely,
25 Vincent Hicks and Harry Santos-Figueroa, or either of them,

1 jhh 13

2 and that Holmes consciously associated himself with these
3 crimes to the extent that his conduct would counsel or
4 cause them to act or help them succeed and that he had
5 a stake in the outcome.

6 Therefore, in order to find that Holmes aided
7 and abetted the commission of either offense charged
8 in the indictment you must be convinced beyond a reasonable
9 doubt that he was knowingly and wilfully doing something
10 to arrange for or aid and assist the commission of this
11 crime by Hicks and Santos-Figueroa, or either of them,
12 that he was a conscious and knowing participant in the
13 crime, had a stake in its outcome and a purpose to
14 make it succeed, and not just a mere bystander at the
15 scene of a crime committed by others.

16 Specific criminal intent must be shown in the
17 mind of the alleged aider and abettor beyond a reasonable
18 doubt as well as in the mind of Hicks and Figueroa, or
19 either of them, before you can convict Holmes.

20 When I use the words "specific criminal intent"
21 I mean the specific intention to do an act which violates
22 the statute. It's not necessary that a defendant know
23 the particular law that he is violating and it's not necessary
24 that the government show that the defendant has read the
25 statute or has any familiarity with the law on bank robbery.

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2 But he must intend to do the generally bad act of robbing
3 a bank the act itself which the law forbids by the
4 means which the law refers to.

5 Before you can convict the defendant on either
6 of the substantive counts charged in the indictment you
7 must be satisfied that the government has proved all of
8 the elements of the crime of robbery, bank robbery,
9 or assault by Hicks or Santos-Figueroa and that this
10 defendant engaged in aiding and abetting them to do that
11 act beyond a reasonable doubt.

12 Now, I am going to turn back to a detailed
13 discussion of each of the elements of the substantive
14 crime of bank robbery. As to the first element, that
15 the bank must be insured by the Federal Deposit Insurance
16 Corporation, your task isn't difficult since the defendant
17 and government have stipulated that the first factual
18 element is true. Nevertheless you must be satisfied
19 beyond a reasonable doubt as to that point before he
20 may be convicted of Count 1. If the bank is not a bank
21 insured by the Federal Deposit Insurance Corporation,
22 then robbing it would not be a federal crime.

23 The second element requires that the money or
24 property which the defendant took or attempted to take
25 or which Santos-Figueroa or Hicks, or either of them, took

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2 or attempted to take was in the care, custody, control,
3 management or possession of the federally insured bank.
4 In regard to this element you will recall the testimony
5 of the bank guards Winston Hill and Joseph Valentin, and
6 if you find that the .38 calibre revolvers were taken
7 from them during the robbery of the 17th of February, 1976,
8 and had been issued to the bank guards by the bank in
9 order to carry out their duties as bank guards, then
10 you may find that property which was taken, if the
11 revolvers were taken, was in the care, custody, control,
12 management or possession of the federally insured branch
13 of Bankers Trust Company at 1770 Madison Avenue.

14 Now, members of the jury, you will understand
15 that Count 1 of the indictment as written and as I
16 read it to you refers to taking property from the bank or
17 attempting to take money from the bank. It's not necessary
18 in order to find a verdict of guilty that you must be
19 satisfied beyond a reasonable doubt that Mr. Holmes aided
20 and abetted Hicks and Santos-Figueroa to do both of these
21 things. It would be sufficient if you found they or one
22 of them were aided and abetted by Mr. Holmes in either
23 attempting to take money or taking property, and of course,
24 a Smith & Wesson revolver is property.

25 I want to caution you as to this matter, however,

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2 that a verdict must be unanimous and in order to convict
3 the defendant on Count 1 all 12 of you must either be
4 satisfied beyond a reasonable doubt that he aided and
5 abetted the taking of property, that is to say, the
6 revolvers, or all 12 of you must unanimously find that
7 he aided and abetted the attempted taking of money by
8 Santos-Figueroa and Hicks, or either of them.

9 Of course, it's conceivable that 12 of you
10 might unanimously find that he aided and abetted the taking
11 of property and aided and abetted the attempt to take
12 money. But the point I want to make is if some of you
13 thought that he aided and abetted the attempted taking
14 of money but did not think that he aided and abetted the
15 taking of property and others of you thought that he aided
16 and abetted the taking of property but did not aid and
17 abet the attempt to take money, then, of course, you would
18 not be unanimous in your verdict. If that is the way
19 you should stand with respect to Count 1, then you would
20 have to report that you are not in agreement.

21 You may not convict unless you unanimously
22 agree on one or the other or both of the two possibilities,
23 attempt to take money, take property. But as I said
24 before, it's sufficient if the government proves either
25 the taking of property or the attempted taking of money.

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2 The third element requires that the taking
3 or attempted taking was from a person or in the presence
4 of a person and was accomplished through the use of an
5 intimidation, force or violence. The taking was from
6 a person or in the presence of a person if you find that
7 there were actual persons in the bank from whom property
8 was taken or money was attempted to be taken.

9 If you find, therefore, that the guards were
10 relieved of their .38 calibre revolvers by Hicks or Santos-
11 Figuerola, or both, and that Mr. Holmes aided and abetted,
12 then this element would be satisfied.

13 Let me now explain the term "through the use
14 of intimidation, force or violence." You may find that
15 shooting Winston Hill under the circumstances constituted
16 use of force and violence. However, the government is
17 not required to show that force and violence were actually
18 used against anyone if it proves beyond a reasonable doubt
19 that the taking was the result of intimidation, that is,
20 the result of placing another person in fear.

21 Intimidation may be established by proof of
22 circumstances that are normally and reasonably calculated
23 to arouse fear in the ordinary person. So if it happened
24 that some extraordinarily timid person was put in fear
25 by something that normally wouldn't frighten a person this

would not be the kind of intimidation with which the statute is concerned.

On the other hand, if the proof shows conduct by a defendant or the person whom he is accused of aiding and abetting which would normally be expected to generate fear, then it's not necessary that those affected should actually have experienced some terror or panic, and even if the particular teller refused to give Hicks money you may find that what Santos-Figueroa and Hicks are alleged to have done, if they did it, would normally generate fear in a reasonable person.

In other words, the question in this respect is an objective one. It's whether the evidence shows the particular conduct was of such a nature as to be a sensible and expectable basis for the creation of fear.

If you find beyond a reasonable doubt that any of these actions constituted the use of force, violence or intimidation, then the third element of Count 1 would be satisfied.

Now, as to the fourth and last of the four elements of the crime charged in Count 1, that is, that the defendant acted knowingly and wilfully and that the person he aided and abetted also acted knowingly and wilfully, both of those must be shown.

What do these words "knowingly and wilfully" mean? Well, first, they don't mean that the government must show that the defendant knew he was breaking a particular law. They don't mean that the government has to show that he intended to profit at the expense of anybody. They have nothing to do with personal or private reasons for violating a statute.

I instruct you that these words "knowingly and wilfully" mean deliberately, intentionally. In other words, you must be satisfied beyond a reasonable doubt that the person whose intent you are considering acted with knowledge, consciously and in a free exercise of his will. The words "knowingly and wilfully" are opposed to the idea of an inadvertent or accidental mistake.

An act is done knowingly if it's done voluntarily and purposely and knowledge and intent exist in the mind. It's not possible to look into a man's mind and see what was going on a year ago. The only way you have for arriving at a decision in the matter of intent is to take into consideration all the facts and circumstances shown by the evidence, including the exhibits, to determine whether the requisite knowledge and intent were present at the time in question. Direct proof isn't necessary. Knowledge and intent may be inferred from all of the surrounding

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2 circumstances.

3 If you find beyond a reasonable doubt that
4 each element of the crime charged in Count 1 was committed
5 by Hicks or Santos-Figueroa, or both of them, and that
6 the defendant, Mr. Holmes, knowingly and wilfully aided
7 and abetted them or either of both of them, then you should
8 return a verdict of guilty on Count 1.

9 If, however, you find that one or more of the
10 elements was not proven as to Hicks or Santos-Figueroa,
11 or one of them, or that knowingly and wilfully aiding
12 and abetting Hicks or Santos-Figueroa, or both of them,
13 was not proved against the defendant beyond a reasonable
14 doubt, then you should return a verdict of not guilty.

15 If your verdict on Count 1 is not guilty, then
16 you do not have to consider Count 2, because Count 2
17 assumes in the allegation the same charges of a factual
18 nature upon which Count 1 was asserted.

19 I will now discuss Count 2 of the indictment
20 with you. Here the defendant is charged with aiding
21 and abetting a violation of Title 18, United States Code,
22 Section 2113(d), alleged to have been committed by Hicks
23 and Santos-Figueroa.

24 Now, this statute makes it a separate and
25 distinct and additional crime to commit the offense charged

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2 in Count 1 if in the commission of that crime the person
3 accused assaults any person or puts in jeopardy the life
4 of any person by the use of a dangerous weapon or device.

5 In order to find this defendant guilty on Count 2
6 you must first find that the defendant aided and abetted
7 an attempt to commit the crime charged in Count 1, that
8 is, that the defendant knowingly and wilfully aided
9 and abetted an attempt to take money that was in possession
10 and custody of a federally insured bank by force, violence
11 and intimidation or that he aided and abetted the taking
12 of property under such circumstances.

13 If you find the defendant guilty of the crime
14 charged in Count 1 you will then go on to consider Count 2
15 and in order to find the defendant guilty of Count 2
16 you must also find beyond a reasonable doubt that the
17 defendant in committing that crime either aided and abetted
18 the assault of one or more persons or aided and abetted
19 the use of a firearm to put in jeopardy the lives of one
20 or more persons.

21 As I have indicated this count requires a finding
22 either, 1, that there was an assault in the bank, or 2,
23 that the lives of one or more persons were placed in jeopardy
24 by the use of a dangerous weapon while committing the
25 violation charged in Count 1. It's not necessary to find

both an assault and an endangering of lives by use of the weapons.

Now, I will define the word "assault." An assault refers to an unlawful attempt or threat to apply force and violence or inflict bodily injury when the attempt or threat is coupled together with an apparent present ability to carry it out, such as to arouse fear in the intended threatened victim that he or she would be subject to immediate physical injury.

An assault as it is defined in law may be committed without actually touching or striking or shooting or doing any bodily harm to the person being assaulted.

So a person who has the apparent present ability to inflict bodily harm or injury on another person and wilfully threatens to inflict such bodily harm, such as by intentionallly flourishing or pointing a loaded gun at another person, may be found to have assaulted such person. And even if you find no assault in connection with Count 2, this count may be established if you find that the lives of one or more people were put in jeopardy by the use of a loaded gun.

So to justify any such finding, either of an assault or a placing in jeopardy, you must be convinced beyond a reasonable doubt that one or more of the persons

1 who entered the bank carried one or more firearms which
2 were drawn and loaded and that they acted intentionally
3 and wilfully in doing so and that this defendant aided
4 and abetted, as I previously explained aiding and abetting
5 to you. In this case if you find that the bank guard was
6 shot by one of them, that action would constitute an
7 assault and it would also place the life of the bank guard
8 in jeopardy.
9

10 Now, it's contended by the government that
11 the defendant Holmes fled from the area of the Bankers
12 Trust Company branch immediately after the alleged
13 commission of the robbery. The flight of a defendant
14 immediately after it is discovered that a crime has been
15 committed is a fact which if proved may tend to prove
16 consciousness of guilt on the part of a defendant and may
17 be considered and weighed by the jury in connection with
18 all the other evidence. Whether or not evidence of flight
19 shows a consciousness of guilt and the significance, if any,
20 which may be attached to such circumstances are matters
21 for your sole determination.

22 The flight of a defendant does not create any
23 presumption of guilt. It's merely a fact which can be
24 considered by you for whatever it's worth together with
25 all the other evidence in the case in determining whether

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guilt has been proved beyond a reasonable doubt.

Now, I want to make note at this time. I told you earlier and I will tell you again that this case and all cases are to be decided according to the proof presented or not presented and not according to what might have been presented. Specifically, I want to remind you again that the defendant doesn't have to prove his innocence and he has no duty whatsoever to call any witnesses or bring in any proof.

There was a remark made in the government's argument and I instruct you now that that remark or that argument had no value whatsoever and you are to put it out of your consideration. That has to do with Santos-Figueroa. If I recall it correctly, it was suggested to you that if Santos-Figueroa had anything helpful to say that Mr. Klempner would have called him as a witness.

Members of the jury, that is an improper argument, because the defendant has no duty whatsoever to call Mr. Santos-Figueroa as a witness or to call anybody as a witness, and specifically, you must not engage in any conjecture or surmise or guesswork as to what some witness if called might have said.

You decide the case, I repeat again, on the evidence which was presented or the lack of evidence, but

not on some guesswork about what some other witness might have testified to. That is not any way to go about deciding a case. So do not infer anything adverse to the defendant whatsoever from a failure to call Santos-Figueroa or from the failure to bring in any evidence, because that is not his duty and the argument is unsound.

Now, under your oath as jurors you cannot allow any consideration of the punishment or possible sentence which might be imposed on this defendant if convicted to influence your verdict in any way or to enter into your deliberations in any way whatsoever. The duty of imposing sentence rests exclusively with the court.

Your function is to weigh the evidence in the case and to determine the case, to decide the factual issues in the case, solely on the basis of the evidence and the law, and you mustn't be influenced by any assumption or conjecture or sympathy or any inference not warranted by the facts until proven to your satisfaction.

If you fail to find beyond a reasonable doubt that the law has been violated by this defendant you shouldn't hesitate for any reason to find a verdict of not guilty. That's your duty.

On the other hand, if you should find that the law has been violated as charged, you should not hesitate

1 because of sympathy or any other reason to render a verdict
2 of guilty as a clear warning that a crime of this
3 character may not be committed with impunity. The public
4 is entitled to be assured of this.
5

6 A word about deliberating. I told you earlier
7 a verdict as to any count must be unanimous. Each juror
8 is entitled to his or her own opinion. You should exchange
9 views with your fellow jurors. That's the purpose of jury
10 deliberations, to discuss, consider the evidence, listen
11 to the arguments of the other jurors, present your individual
12 views, and consult with one another and reach a fair and
13 just verdict solely and wholly on the evidence. But the
14 verdict represents the decision of each of you and each
15 of you decide the case for himself or herself.

16 You shouldn't hesitate to change an opinion you
17 may hold which the discussion shows is erroneous. However,
18 if after carefully weighing all of the evidence and listening
19 to other jurors any one of you entertains a conscientious
20 view that differs from the rest, you are not to give up
21 simply because you are outnumbered or outweighed. Your
22 final verdict must reflect your individual conscientious
23 judgment, each of you, as to how the particular count
24 you are considering then should be decided. In order to
25 reach a verdict on any count you must be unanimous.

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2 In the course of your deliberations you may
3 want to have part of the testimony read to you or you may
4 find you are uncertain as to the meaning of some part
5 of the court's instructions, you may want to see the
6 exhibits or some or all of them or a copy of the indictment.
7 If anything like that happens the foreman will send out
8 a note simply asking for what the jury would like to have
9 and that note will be delivered to the U.S. Marshal and
10 the material will be supplied to you.

11 In communicating with the court do not indicate
12 in the note how the jury is then divided or how you may
13 then stand.

14 I remind you that if you ask for a copy of the
15 indictment, it's merely a charge or an accusation and it
16 has no status as evidence. Please don't request to have
17 testimony read to you until you have discussed it and
18 exhausted your collective recollections and reached the
19 point where you really need to have it done. But if you do
20 want it done I am perfectly willing to do so. Also, if you
21 do make such a request, try to be as specific as possible,
22 so the court will know exactly what you want.

23 The foreman will be Mrs. Boyd, juror number 1,
24 and she will send out any notes from the jury by giving
25 a note to the U.S. Marshal. When the jury has reached

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a verdict just tell the marshal that you reached a verdict and the jury will be brought back into court to give its verdict.

I could conclude by saying to you that your oath sums up your duty, and that is that you, without fear or favor to anyone, will well and truly try the issues between this defendant and the government of the United States, based solely on the evidence and the court's instructions as to the law, and a true verdict give. It is important to the defendant, it is important to the government, it is important to you.

At this time will you swear the marshal.

(A marshal was duly sworn.)

THE COURT: Miss Kemp and Mrs. Jennings, I want to thank you for your attendance throughout this trial. It turns out that we won't need you because all of the rest of the jurors have remained in good health and they are ready to go to work. So you are about to be excused. I will give you several instructions before you leave. The court thanks you for your attendance.

I ask you not to speak any of the other jurors or to any of the attorneys or parties or say anything about this case to anyone until after the jury's work is concluded. That might not necessarily be today. So

6/14/77
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Ira Block as per
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